

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-PS-

JOSE BENITEZ GOMEZ, 14521-055,

Petitioner,

-v-

U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
DECISION AND ORDER
05-CR-6058
06-CV-6367

UNITED STATES OF AMERICA,

Respondent.

Petitioner, Jose Benitez Gomez, acting *pro se*, seeks relief pursuant to 28 U.S.C. § 2255, alleging that his conviction in this Court was unconstitutionally or unlawfully obtained, as set forth more precisely in the petition (Docket No. 20).

Petitioner had requested an extension of his time to file his petition, which was denied (Docket No. 21). Judgment was entered on July 6, 2005. He had ten days in which to file his Notice of Appeal – July 16, 2005. July 16, 2005 was a Saturday, and therefore, petitioner's time in which to file his Notice of Appeal expired on July 18, 2005. The petition was docketed on July 25, 2006, but petitioner indicates that he placed the petition in the mail on July 15, 2006. There is nothing to indicate that the papers were mailed later than July 18, 2006. A *pro se* prisoner litigant's papers are deemed to have been filed when they are placed in the hands of prison officials for mailing, *see Houston v. Lack*, 487 U.S. 266, 271 (1988); *see also Dory v. Ryan*, 999 F.2d 679, 682 (2d Cir. 1993), *modified on reh'g*, 25 F.3d 81 (2d Cir. 1994). Thus, the Court cannot say on the information before it that the petition is untimely.

Accordingly,

IT HEREBY IS ORDERED as follows:

1. The motion for reconsideration is denied as moot.
2. Pursuant to Rules 4 and 5 of the Rules Governing Section 2255 Proceedings in the United States District Courts, the United States Attorney shall file and serve an **answer** to the petition with the Clerk of Court no later than **May 22, 2008**. The answer shall respond to the allegations of the petition and shall state whether petitioner has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. Further, the answer shall state whether an evidentiary hearing was afforded petitioner in a federal court, whether petitioner appealed the conviction, and what ruling, if any, the United States Court of Appeals has made on the appeal.

Respondent also shall to file and serve by the above date a **memorandum of law** with the Clerk of Court addressing each of the issues raised in the petition and including citations of relevant supporting authority.

3. Petitioner shall have twenty (20) days upon receipt of the answer to file a written response to the answer and memorandum of law.
4. Within twenty (20) days of the date this order is filed with the Clerk of Court, respondent may file a motion for a more definite statement or a motion to dismiss the petition, accompanied by appropriate exhibits which demonstrate that an answer to the petition is unnecessary. The timely filing of such motion shall extend the time for filing an answer for fourteen (14) days, but the failure of the Court to act upon the motion within that time shall not further extend the time for filing an answer.

5. The Clerk of the Court shall serve a copy of the application, together with a copy of this order, upon the United States Attorney for the Western District of New York, at 100 State Street, Rochester, New York 14614.

6. All docketing for this action shall be made in the related criminal action 05-CR-6058.

**PETITIONER MUST FORWARD A COPY OF ALL FUTURE PAPERS AND
CORRESPONDENCE TO THE UNITED STATES ATTORNEY.**

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

DATED:

April 8, 2008
Rochester, New York